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No. 89-908

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

AUTOMOBILE CLUB OF MICHIGAN and AUTO CLUB INSURANCE ASSOCIATION,

Petitioners,

v.

WILLIAM J. BULLOCK,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Michigan

BRIEF AMICUS CURIAE OF GENERAL MOTORS CORPORATION IN SUPPORT OF THE PETITIONERS

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BRIEF AMICUS CURIAE OF GENERAL MOTORS CORPORATION IN SUPPORT OF THE PETITIONERS

General Motors Corporation ("GM") respectfully submits this brief as amicus curiae in support of the petitioners Automobile Club of Michigan and Auto Club Insurance Association (hereinafter referred to together as "AAA").[1]

[1] The written consents of the parties to the filing of this brief have been filed with the Clerk.

INTEREST OF THE AMICUS CURIAE

GM's interest in this case arises from the fact that it is a large employer of unionized workers, many of whom are employed in the State of Michigan, and the fact that it has recently sought this Court's review in *Wells* v. *General Motors Corp.*, 881 F.2d 166 (5th Cir. 1989), petition for cert. filed, No. 89-____, December 27, 1989. In *Wells*, the court of appeals held, *inter alia*, that this Court's decision in *International Longshoremen's Ass'n.* v. *Davis*, 476 U.S. 380 (1986), effectively abolished the "arguably prohibited" branch of the *Garmon* pre-emption doctrine. Under the Fifth Circuit's interpretation of *Davis*, a party's showing that its own conduct (as alleged by its opponent) arguably violated the National Labor Relations Act is not sufficient to require pre-emption because it is not a claim that could "reasonably be *upheld* by the Board." 881 F.2d at 171.

Petitioners in this case forcefully argue that respondent's state law claims seek to regulate conduct arguably protected or prohibited by the NLRA and are therefore pre-empted under *Garmon*. Obviously, if the "arguably prohibited" portion of petitioners' argument has any merit at all (and we believe it does), the Fifth Circuit in *Wells* incorrectly held that *Davis* precludes such an argument. Resolution of petitioners' *Garmon* claim thus might have a direct impact on *Wells*.

In addition, the petition presents the question of whether an employer's statutory right to unilaterally implement its final offer following a collective bargaining impasse is an economic weapon that the states cannot regulate. The Michigan Supreme Court's restrictive interpretation of the *Machinists* doctrine and of the economic weapons available to employers conflicts with the decisions of other courts and is of grave concern to GM as a Michigan employer.

GM is filing this brief to demonstrate how this case relates to the Fifth Circuit's *Wells* decision and also to emphasize the importance of the issues presented by the petition to employers in Michigan and elsewhere.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves two of the three labor law pre-emption doctrines that this Court has developed over the past 35 years to ensure the integrity of the collective bargaining process and of federal regulation of union-management relations.[2] The *Garmon* doctrine preserves the exclusive jurisdiction of the National Labor Relations Board over claims relating to conduct regulated by the National Labor Relations Act. And the *Machinists* doctrine precludes state regulation of the "economic weapons" of unions and employers.

The Michigan Supreme Court misapplied both of these pre-emption doctrines in this case. The court's decision would permit the very kind of state interference that *Garmon* and *Machinists* were intended to preclude. It would allow employees to bypass the National Labor Relations Board and to sue in state court over conduct that is regulated by the NLRA, and it would effectively allow the state to restrict or even prohibit important economic weapons that Congress intended employers to be free to use. This Court should grant the petition and should reverse the Michigan Supreme Court's decision.

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[2] The third pre-emption doctrine requires that disputes relating to the terms of collective bargaining agreements be decided under the federal law of Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455-457 (1957).

ARGUMENT

I. This Court Should Grant The Petition To Reaffirm The Validity Of The Entire *Garmon* Doctrine.

In *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 244-245 (1959), the Court held that state regulation of conduct arguably within the realm of the Board is pre-empted by the Act:

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 of the National Labor Relations Act, or constitute an unfair labor practice under §8, due regard for the federal enactment requires that state jurisdiction must yield.
>
> * * * * *
>
> When an activity is arguably subject to §7 or §8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.

As the Court only recently emphasized in *Davis*, 476 U.S. at 389-390, even in ambiguous cases in which it is not "clear whether the particular activity regulated by the States [is] governed by §7 or §8 * * * 'courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the * * * Board.' " See also *Lingle* v. *Norge Div. of Magic Chef, Inc.*, 108 S. Ct. 1877, 1883 n.8 (1988).

Petitioners contend that AAA's unilateral implementation of its final offer at the bargaining table was conduct arguably protected or prohibited under Section 8 of the Act. It would be prohibited if the prerequisites for unilateral change upon impasse did not exist at the time, and

it would be protected if they did. GM agrees with petitioners that in these circumstances, respondent's state law claims were pre-empted under *Garmon*.

Any resolution of this issue must begin with an acknowledgment that both branches of the *Garmon* doctrine remain intact, and that an employer remains free to argue that claims against it are pre-empted if they allege conduct that is arguably prohibited by Section 8. That might seem to be an uncontroversial acknowledgment. But in *Wells* v. *General Motors Corp.*, 881 F.2d 166 (5th Cir. 1989), petition for cert. pending, No. 89-____ (Dec. 27, 1989), the Fifth Circuit misinterpreted the Court's decision in *Longshoremen* v. *Davis* to effectively abolish the "arguably prohibited" branch of *Garmon*.

In *Wells*, GM argued in support of its motion for summary judgment that the plaintiffs' claims of fraud and misrepresentation amounted to charges that GM circumvented and deceived the union and bargained directly with employees. If true, those allegations would show that GM failed to bargain in good faith and thus violated Section 8(a)(5), 29 U.S.C. § 158(a)(5). The Fifth Circuit acknowledged that at least some of the conduct alleged by the employees would violate Section 8(a)(5), but it held that under *Davis*, state regulation of conduct arguably prohibited by the NLRA is no longer pre-empted (881 F.2d at 171; emphasis in original):

> By its own cast, GM's argument concerning its "circumvention" of union representatives goes only to show that its conduct was arguably *prohibited* by the Board; hence, its claims could not reasonably be *upheld* by the Board.

The Fifth Circuit thus read *Davis* in a startling and unprecedented way: as eliminating the "arguably prohibited"

branch of *Garmon* by concluding that a party's assertion that its own conduct (as alleged by its opponent) arguably violated the Act is not sufficient to require pre-emption because it is not a claim that could "reasonably be *upheld* by the Board." *Ibid.*

As we explain in our petition in *Wells*, the Fifth Circuit's interpretation directly conflicts with the decisions of several other courts of appeals that have recently applied the "arguably prohibited" branch of the *Garmon* doctrine. Moreover, the Fifth Circuit's interpretation of *Davis* is plainly incorrect. Contrary to the broad reading given it by the Fifth Circuit, *Davis* merely defined the term "arguably." The Court held that to sustain its burden of showing that a claim involves conduct that is "arguably" prohibited or protected by the NLRA, "a party asserting pre-emption must advance an interpretation of the Act that is not plainly contrary to its language and that has not been 'authoritatively rejected' by the courts or the Board." 476 U.S. at 395. The party must show "that the Board reasonably could uphold a claim based on such an interpretation." *Ibid.* In other words, *Davis* requires the party asserting *Garmon* pre-emption to do more than articulate a farfetched theory under which there would be a remote possibility that the Board would find its conduct prohibited or protected.

The erroneous construction of *Davis* adopted by the Fifth Circuit would have widespread and unfortunate consequences not even remotely contemplated by this Court. By abolishing the "arguably prohibited" branch of *Garmon*, it would open the door to wholesale state regulation of conduct that Congress intended to be regulated only through the NLRB. In fact, the Fifth Circuit's reformulation of *Garmon* would not be met even in cases where the conduct alleged was actually (rather than arguably)

prohibited by the Act. This Court's subsequent reiteration of the "arguably prohibited" branch in *Lingle*, 108 S. Ct. at 1883 n.8, makes clear that it does not interpret *Davis* as the Fifth Circuit did.

Although the Michigan Supreme Court in this case misapplied the *Garmon* doctrine, at least it acknowledged the continuing validity of the "arguably prohibited" branch. Pet. App. 22a-23a. However, the Michigan court's determination that so basic a federal labor law issue as the circumstances under which an employer can implement its final offer can be determined under state law is so damaging to the federal regulatory scheme that it cries out for review. We urge the Court to grant certionari to make it clear that claims similar to those of respondent are pre-empted under *Garmon*. By doing so, the Court would reemphasize that *Davis* did not abolish *sub silentio* the "arguably prohibited" branch of *Garmon* pre-emption.

II. This Court Should Grant The Petition To Reaffirm That The States Cannot Restrict The Lawful Economic Weapons Of Employers And Unions.

The second pre-emption doctrine involved in this case precludes state regulation of labor relations conduct that Congress intended to remain unregulated. *Machinists* v. *Wisconsin Employment Relations Comm'n.*, 427 U.S. 132 (1976). The *Machinists* doctrine leaves unions and employers free to use lawful economic weapons to bring about resolution of collective bargaining disputes. It recognizes that "[i]n selecting which forms of economic pressure should be prohibited * * * Congress struck the 'balance * * * between the uncontrolled power of management and labor to further their respective interests.' " 427 U.S. at 146 (quoting *Teamsters* v. *Morton*, 377 U.S. 252, 258-259 (1964)). " '[R]esort to economic weapons should

more peaceful measures not avail' is the right of the employer as well as the employee, *American Ship Bldg. Co.* v. *NLRB*, 380 U.S. at 317, and the States may not prohibit the use of such weapons or 'add to an employer's federal legal obligations in collective bargaining' any more than in the case of employees." *Id.* at 147.

Petitioners contend that unilateral imposition of an employer's final bargaining offer upon impasse is an economic weapon immune from state interference under *Machinists*. The Michigan Supreme Court summarily rejected that argument on the inexplicable ground that respondent's "action is essentially an ordinary contract action, routinely heard in state court." Pet. App. 27a. That may be true, but it is completely irrelevant to the pre-emption issue. The critical question for pre-emption purposes is not whether the state law claim is a routine contract action, or a tort action, or an action under a state labor law. The relevant question is whether the state law claim would restrict or regulate economic weapons that Congress intended to be regulated only by "the free play of economic forces." *Machinists*, 427 U.S. at 146-147. If state law does regulate such a weapon, it is pre-empted, no matter how "routine" the state claim may be or what it is called.

The decision of the Michigan Supreme Court that AAA's unilateral imposition of its final offer upon impasse is *not* a protected economic weapon conflicts with decisions of at least two federal courts of appeals. In *National Metalcrafters* v. *McNeil*, 784 F.2d 817, 826-828 (1986), the Seventh Circuit held that an employer's unilateral imposition of a vacation payment formula after the parties had reached impasse was protected under the *Machinists* doctrine. And in *Powell* v. *National Football League*, 888 F.2d 559 (1989), the Eighth Circuit rejected a contention that the nonstatutory labor exemption to the antitrust

laws expired upon impasse. In reaching that conclusion, the court relied on the fact that federal law provides a "comprehensive array" of economic weapons that are available "even after impasse." 888 F.2d at 568. "After impasse, an employer may make unilateral changes that are reasonably comprehended within its pre-impasse proposals. * * * [A] dispute such as the one before us 'ought to be resolved free of intervention by the courts' * * *." *Ibid.*

The Michigan Supreme Court's decision presents a serious obstacle to the unfettered resolution of collective bargaining disputes in the state. It would tip the economic balance by denying employers one of the most significant economic weapons in their arsenal. The right of employers to unilaterally impose a final offer upon impasse has long been recognized. This Court should grant the petition to resolve the conflict created by the Michigan Supreme Court's decision and to make it clear that state law cannot restrict this important employer weapon.

CONCLUSION

The petition for a writ of certionari should be granted.

Respectfully submitted.

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